STATE OF WISCONSIN CIRCUIT COURT BRANCH 8 DANE COUNTY

KHARY PENEBAKER; MARY ARNOLD; and BONNIE JOSEPH, individually and as relators on behalf of the State of Wisconsin,

Plaintiffs,

v.

ANDREW HITT; ROBERT F. SPINDELL, JR.; BILL FEEHAN; KELLY RUH; CAROL BRUNNER; EDWARD SCOTT GRABINS; KATHY KIERNAN; DARRYL CARLSON; PAM TRAVIS; MARY BUESTRIN; JAMES R. TROUPIS; KENNETH CHESEBRO; and ABC DEFENDANTS,

Defendants,

and

STATE FARM FIRE AND CASUALTY COMPANY,

Intervenor.

Case No. 22CV1178

PLAINTIFFS' CONSOLIDATED BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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INTRODUCTION

Plaintiffs' First Amended Complaint (FAC) alleges the following: On December 14, 2020, Defendants Hitt, Spindell, Feehan, Ruh, Brunner, Grabins, Kiernan, Carlson, Travis, and Buestrin met at the State Capitol. They signed a certificate falsely stating that they were the duly elected presidential electors for Wisconsin and that they were casting the State's electoral votes for Donald J. Trump and Michael R. Pence. Defendant Hitt then signed a cover letter falsely stating that the certificate reflected the votes of Wisconsin's presidential electors, and he transmitted the letter and certificate to state and federal officials. These fake votes, along with the fake votes from six other swing states, were cast as part of a nationwide scheme to overturn the results of the popular election at the Joint Session of Congress on January 6, 2021. Defendants Chesebro and Troupis were principal architects of the scheme, and they planned and coordinated the Elector Defendants' actions on December 14, 2020. Defendant Chesebro was in the room when the fake votes were cast, and Defendant Troupis personally assisted efforts to deliver the fake votes to the Vice President as late as the morning of January 6, 2021.

These actions—which are confirmed by publicly available records—violated a number of state and federal laws, and Plaintiffs were injured as a result. Plaintiffs Penebaker and Arnold, who were duly elected as 2020 presidential electors for the State of Wisconsin, had their legitimacy undermined and their reputations harmed. And all Plaintiffs, personally and as relators, suffered from Defendants' unlawful use of public resources and interference with Wisconsinites' interest in their right to vote. As alleged in the FAC, Plaintiffs are entitled to equitable and monetary relief, including punitive damages, because they have stated claims for civil conspiracy, public nuisance, and quo warranto. At a minimum, Plaintiffs are entitled to relief under Article I, Section 9 of the Wisconsin Constitution.

Defendants have moved to dismiss,[1] raising a host of meritless arguments. These range from misguided attacks on Plaintiffs' standing and ability to satisfy relevant pleading requirements, to a grab bag of inapplicable defenses such as advice of counsel and legal immunity, to a confused assertion that Defendants did nothing wrong because they were required to falsely assume of the office of presidential elector in order to preserve their preferred candidate's ability to continue challenging the results of the election. As explained below, these arguments fail, and none warrants dismissal here. Defendants' motions should be denied.

STANDARD OF REVIEW

"A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." *Data Key v. Permira Advisers LLC*, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693 (internal quotation marks and citation omitted). The reviewing court "accept[s] as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." *Id.* (citing *Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶11, 283 Wis. 2d 555, 699 N.W.2d 205). "In order to survive a motion to dismiss, '[p]laintiffs must allege facts that plausibly suggest they are entitled to relief' as a matter of law." *State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶10, 402 Wis. 2d 539, 976 N.W.2d 821 (quoting *Data Key Partners*, 2014 WI 86, ¶31).

ARGUMENT

Defendants' Motions to Dismiss should be denied for the reasons stated below.

I. Plaintiffs have suffered cognizable harms.

Defendants, in various guises, seek dismissal of the FAC for failure to allege a cognizable injury. Sometimes, they couch this as a standing argument, arguing that Plaintiffs have no

[1] Only the Elector Defendants and Defendant Troupis have moved to dismiss. Dkt. 185, 186, 190, 191. Defendant Chesebro has answered the Complaint. Dkt. 199.

personal stake and complain only about a generalized grievance; at other times, they complain that Plaintiffs have suffered no harm sufficient to warrant relief; at still other points, they complain about the specific types of harm needed to support particular causes of action. None of these complaints is warranted. Plaintiffs have alleged harm in three capacities, and each is sufficient to sustain this action.

As a preliminary matter, it is well established that, "[b]ecause our state constitution lacks the jurisdiction-limiting language of its federal counterpart, 'standing in Wisconsin is not a matter of jurisdiction, but of sound judicial policy.'" *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶17, 402 Wis. 2d 587, 977 N.W.2d 342 (quoting *McConkey v. Van Hollen*, 2010 WI 57, ¶15, 326 Wis. 2d 1, 783 N.W.2d 855). Our Supreme Court has held that "standing should be liberally construed," *City of Mayville v. DOA*, 2021 WI 57, ¶18, 397 Wis. 2d 496, 960 N.W.2d 416 (citing *City of Madison v. Town of Fitchburg*, 112 Wis. 2d 224, 230, 332 N.W.2d 782 (1983)), and that judicial policy favors hearing cases that present "carefully developed and zealously argued" issues, *McConkey*, 2010 WI 57, ¶16. Thus, while a plaintiff "must have a personal stake in the outcome of the controversy" to demonstrate standing, *Marx v. Morris*, 2019 WI 34, ¶35, 386 Wis. 2d 122, 925 N.W.2d 112, Wisconsin courts recognize that the personal stake can be minimal; "even an injury to a trifling interest may suffice." *McConkey*, 2010 WI 57, ¶15 (internal quotation marks and citation omitted).

Plaintiffs allege far more than the "trifling interest" necessary to establish their right to sue. First, Plaintiffs Penebaker and Arnold allege that they have suffered reputational harm. FAC ¶¶267, 285–287. By securing nominations to serve as presidential electors and then assuming the position to exercise the rights and duties of that office once Wisconsin voters elected them, Plaintiffs Penebaker and Arnold took on a professional role and responsibility to cast their votes

as the law required. By falsely purporting to act as electors and transmitting their votes to other public officials as if they were the electoral votes of Wisconsin, *see* FAC Ex. G, Defendants denigrated these Plaintiffs' professional reputations by casting doubt on their status as true electors. FAC ¶¶267, 285–287. This undermined the legitimacy of Plaintiffs' service in that role, and created confusion and uncertainty as to the validity of the actions that they took pursuant to their duties as true electors. Such harms to reputation created by an actionable conspiracy have long been held sufficient. *Singer v. Singer*, 245 Wis. 191, 198, 14 N.W. 2d 43 (Wis. 1944) (injuries to plaintiff's character actionable in a civil conspiracy suit).

Second, all three Plaintiffs suffered harm in their capacity as voters. The Supreme Court has long afforded the right to vote "a dignity not less than any other of many fundamental rights." *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 15, 128 N.W. 1041 (1910). It is "a right which the law protects and enforces as jealously as it does property in chattels or lands," and "[t]he law maintains and vindicates it as vigorously as it does any right of any kind which men may have or enjoy." *Id.* (internal quotation marks and citation omitted). As discussed below, *see infra* pp. 22–23, Defendants tried to nullify the ballots cast by the entire Wisconsin electorate. Wisconsin voters such as Plaintiffs thus have standing to challenge Defendants' unlawful acts.[2]

[2] Attorney Edward G. Ryan, later Chief Justice of the Wisconsin Supreme Court, eloquently articulated the harms caused to voters by unlawful election interference. In *Attorney General ex rel. Bashford v. Barstow*, 4 Wis. 567 (1855), Ryan successfully represented Coles Bashford, who alleged that his political opponent, William Barstow, had usurped the office of Governor by assuming the office through fraud. In persuading the Supreme Court that it had jurisdiction to hear the action, Ryan explained:

> There was no gross usurpation ever successful that did not lead to still greater outrages, more audacious wrongs. When courts refuse to exercise the power of correction with

Finally, all Plaintiffs bring suit in their capacity as Wisconsin taxpayers. Standing in Wisconsin is not to be construed "narrowly or restrictively," *Town of Eagle v. Christensen*, 191 Wis. 2d 301, 316, 529 N.W. 2d 245, 251 (Ct. App. 1995), and, while some allegation of pecuniary loss is required, "[e]ven a loss or potential loss which is infinitesimally small with respect to each individual taxpayer will suffice to sustain a taxpayer suit," *Hart v. Ament*, 176 Wis. 2d 694, 699, 500 N.W.2d 312 (1993) (citing *S.D. Realty Co. v. Sewerage Comm'n of Milwaukee*, 15 Wis. 2d 15, 21–22, 112 N.W.2d 177 (1961)). Plaintiffs have alleged just such a loss in the unnecessary allocation of state resources that was required to facilitate the Elector Defendants' December 14, 2020, meeting (where Defendant Chesebro was also present). FAC ¶¶129, 131–132, 134–135. These facts are sufficient to establish Plaintiffs' standing to maintain this action as Wisconsin taxpayers.

Defendant Troupis is incorrect that the injury to the Plaintiffs as taxpayers is insufficient to maintain this suit. He argues that taxpayer standing applies only when suit is brought against the government, Dkt. 191 at 18, and cannot support a suit against private parties. But that is not the law in Wisconsin. *See Schulz v. Kissling*, 228 Wis. 282, 291, 280 N.W. 388 (1938). In *Schulz*, a taxpayer sought to recover public funds paid to a truck manufacturer by the town of Menomonee. The plaintiffs alleged that the town made the payments in a manner contrary to the

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> which they are invested, usurpation, fraud and villainy gather strength and courage. If this court were to fail in its duty in this cause, we might easily imagine what would follow.
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> Let this usurpation succeed. . . . Let fraud and villainy triumph. Let them prosper. Let them feel that they are strong. Let them grow insolent in the confidence of immunity. Let yet greater wrongs be perpetrated than have been, and you will have established the precedent, that they are beyond the reach of justice. . . .

4 Wis. at 684. The Court agreed, exercised jurisdiction, and, although Barstow conceded and resigned before final judgment, ultimately deposed the Lieutenant Governor acting in the office, and seated Bashford. *See generally* https://www.wicourts.gov/courts/history/article11.htm.

statutory procedures for vehicle purchases and sought repayment from the manufacturer to the town treasury. The defendants argued that the town was the party allegedly harmed and thus the proper party to bring suit. But the Supreme Court disagreed. The Court acknowledged that in cases to recover public funds, "[o]rdinarily, the town is the proper party to bring the action," *id.* at 291, but it emphasized that it would be unreasonable to expect the very town officials allegedly responsible for the wrongful expenditures to initiate a claim to recover those expenditures, *see id.* The Court explained that, under the circumstances, taxpayer suits against private parties "were not only permitted, but . . . favored." *Id.*; *see also Coyle v. Richter*, 203 Wis. 590, 592, 234 N.W. 906 (1931) ("This class of actions is for the public benefit.").

II. Plaintiffs have stated a claim for civil conspiracy.

"[T]he sufficiency of a complaint depends on substantive law that underlies the claim made because it is the substantive law that drives what facts must be pled." *Cattau v. Nat'l Ins. Servs. of Wis., Inc.*, 2019 WI 46, ¶6, 386 Wis. 2d 515, 926 N.W.2d 756 (per curiam) (quoting *Data Key*, 2014 WI 86, ¶31). "If proof of the well-pleaded facts in a complaint would satisfy each element of a cause of action, then the complaint has stated a claim upon which relief may be granted." *Id.* (citing *Data Key*, 2014 WI 86, ¶21). "A civil conspiracy is 'a combination of two or more persons by some concerted action to accomplish some unlawful purpose or to accomplish by unlawful means some purpose not in itself unlawful.'" *Thomas ex rel. Gramling v. Mallett*, 2005 WI 129, ¶168, 285 Wis. 2d 236, 701 N.W.2d 523 (quoting *Onderdonk v. Lamb*, 79 Wis. 2d 241, 246, 255 N.W.2d 507 (1977)). To state a cause of action for civil conspiracy, a plaintiff must allege three elements: "(1) [t]he formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting from such act or acts." *Id.* (quoting *Onderdonk*, 79 Wis. 2d at 247). As to the third element, Section I, *supra*, establishes

that Plaintiffs have pled a cognizable injury and damages sufficient to support a civil conspiracy claim. Plaintiffs' FAC adequately alleges the first and second elements as well.[3]

A. Plaintiffs' allegations show the formation and operation of a conspiracy.

Plaintiffs must plead "facts that show some agreement, explicit or otherwise, between the alleged conspirators on the common end sought and some cooperation toward the attainment of that end." *Thomas*, 2005 WI 129, ¶168 (internal quotation marks and citation omitted). Plaintiffs' FAC meets this standard. Plaintiffs allege that the Elector Defendants:

(1) met earlier in the day on December 14, 2020, at a "secret meeting place," FAC ¶130 (internal quotation marks and citation omitted);

(2) in their own words, "convened and organized" together at the State Capitol on December 14, 2020, at noon, FAC ¶140 & Ex. G at 3;

(3) acted together to "elect[] by the Electors present" an alternate when one nominee was absent, FAC ¶¶141, 143 & Ex. G at 2;

(4) "being so assembled and duly organized," purported to "vote by ballot" for President and Vice President of the United States, FAC Ex. G at 3; and

(5) each signed a certificate memorializing their votes for Donald J. Trump for President and Michael R. Pence for Vice President. FAC ¶147–149 & Ex. G at 3–4.

Moreover, as to Defendants Troupis and Chesebro, the FAC alleges that:

(1) Defendant Chesebro was "central to the creation of the plan" to deploy fraudulent electors to overturn the results of the 2020 election, FAC ¶87 (internal quotation marks and citation omitted);

(2) Defendant Chesebro drafted the legal memoranda that laid the plan's foundation, and shared them with Defendant Troupis, FAC ¶¶88–93;

(3) Defendant Troupis was one of Defendant Chesebro's main points of contact with the Trump Campaign in Wisconsin,[4] FAC ¶121;

(4) Defendant Chesebro's December 9 memo outlined detailed steps for the alternate

[3] Defendant Troupis concedes that Plaintiffs have met their burden as to the first element. Dkt. 190 at 4 (noting only that "Plaintiffs fail on elements (2) and (3)").

[4] Defendant Chesebro admits this allegation. Dkt. 199 at 15, ¶121.

electors, and the Elector Defendants took each of those steps, FAC ¶¶99–100;

(5) Prior to the December 14, 2020, meeting of the Elector Defendants, Defendant Chesebro drafted and distributed the certificate and other documents to be used by the Elector Defendants (as well as those used in Arizona, Georgia, Michigan, Nevada, New Mexico, and Pennsylvania) when casting their fraudulent votes, FAC ¶116;

(6) Defendant Troupis called Defendant Chesebro's proposal "[o]ur strategy" in emails with Trump campaign officials, FAC ¶122 (internal quotation marks and citation omitted), and frequently communicated about the plan with the Wisconsin Republican Party, of which Defendant Hitt was the Chair, FAC ¶4, through its outside counsel Joe Olson, FAC ¶120; and

(7) Defendant Chesebro was present when the Elector Defendants met at the State Capitol to execute the scheme. FAC ¶132.[5]

Plaintiffs also allege that the certificate—which Defendant Chesebro drafted, Defendants Troupis and Chesebro encouraged the Elector Defendants to sign, and each Elector Defendant did sign—was transmitted to state and federal officials shortly thereafter by Defendant Hitt. FAC ¶¶150–151 & Ex. G at 1. Defendant Troupis then tried again to transmit the certificate directly to Vice President Pence on the morning of January 6, 2021. FAC ¶¶153–155.

These facts show that Defendants agreed "on the common end sought"—the production of a fraudulent certificate and its transmission to public officials—and "cooperat[ed] toward the attainment of that end." *Thomas*, 2005 WI 129, ¶168 (internal quotation marks and citation omitted). Thus, Plaintiffs have adequately alleged the formation and operation of the conspiracy.

B. Plaintiffs' allegations show wrongful acts done pursuant to the conspiracy.

Plaintiffs have also adequately alleged the wrongful acts that Defendants took in furtherance of the conspiracy.

1. Plaintiffs have alleged wrongful acts under state law.

[5] Defendant Chesebro admits this allegation. Dkt. 199 at 16, ¶132.

Plaintiffs have alleged that Defendants' conduct was wrongful under four provisions of state law: Wis. Stat. §§ 5.10, 7.75, 939.05, and 946.69.[6] Wisconsin Stat. § 5.10 sets out the means by which the presidential electors are elected from among slates of nominees chosen by the state political parties, and it provides that votes for the presidential and vice-presidential candidates named on the ballot are votes for the electors pledged to those candidates. By purporting to act as electors for candidates who did not win the popular vote, the Elector Defendants—and Defendants Chesebro and Troupis who conspired with them—acted wrongfully. Wisconsin Stat. § 7.75 sets out the procedure to be followed by the "electors for president and vice president" once they have been elected by the vote of the people. The Elector Defendants were not elected to serve as the electors, and by purporting to follow these procedures, the Elector Defendants—and Defendants Chesebro and Troupis who conspired with them—acted wrongfully. Neither section "expressly authorized" the Elector Defendants to meet at the State Capital, cast their votes, or transmit the certificate, Defendants' arguments notwithstanding. Dkt. 186 at 9; *see* Dkt. 191 at 25. As explained below, Defendants repeatedly confuse their status as *nominees* to be presidential electors, which they were, with the role of actual presidential *electors*, which they were not.

Defendants also took actions that meet the criminal prohibitions outlined in Wis. Stat. §§ 946.69 and 939.05. Wisconsin Stat. § 946.69 prohibits impersonating or falsely assuming to act as a public officer or employee. Under this section, it is a crime in Wisconsin for an individual to (1) "[a]ssume[] to act in an official capacity or to perform an official function, knowing that he or she is not the public officer or public employee . . . that he or she assumes to

[6] Defendants also appear to have violated Wis. Stat. § 12.13(1)(a), which prohibits voter fraud. *See* FAC ¶94.

be"; (2) "[e]xercise[] any function of a public office, knowing that he or she has not qualified so to act or that his or her right so to act has ceased"; or (3) "[i]mpersonate[] or represent[] himself or herself to be a public officer or public employee . . . with the intent to mislead others into believing that he or she is actually a public officer or public employee."

As explained below in Section IV, *infra*, presidential electors are public officers. Furthermore, the FAC adequately alleges that the Elector Defendants' actions violated all three of these provisions: knowing they were never elected, they nevertheless (1) purported to act as presidential electors, FAC ¶¶147–150; *see* Wis. Stat. § 5.10, (2) met, voted, and transmitted their votes as if they were presidential electors, FAC ¶¶147–150; *see* Wis. Stat. § 7.75, and (3) represented themselves as presidential electors by transmitting their "votes" to various public officials, intending to mislead others into believing that it was a true document representing the vote of the presidential electors for the State of Wisconsin, FAC ¶150 & Ex. G at 1. As noted above, neither the certificate signed by each Elector Defendant nor the cover letter signed by Defendant Hitt contained any qualification or indication that the votes were conditional in any way, even though other certificates drafted by Defendant Chesebro and submitted by alternate electors in other states did contain such qualification. *See, e.g.*, FAC ¶127.[7]

Moreover, Defendants' actions after December 14, 2020, only further underscore the wrongfulness of their conduct. Defendants did not sit passively by while other "individuals attempted to make some use of the GOP Electors' actions." Dkt. 186 at 14. To the contrary, Defendants facilitated and cooperated in the scheme: never did any Defendant disavow or disclaim that their "originals of Wisconsin's electoral votes for President and Vice President,"

[7] The Elector Defendants now characterize these votes as "provisional," Dkt. 186 at 18, 24, but nothing on the face of the documents would have alerted any recipient that this might be true.

FAC Ex. G at 1, were not what they falsely purported to be. And they had plenty of opportunity to do so. As just a few examples, they could have done so:

(1) on December 21, 2020, when Governor Evers issued his final determination as to the state's electors, FAC Ex. E;

(2) on January 2, 2021, when Wisconsin Senator Ron Johnson and newly minted Wisconsin Congressman Scott Fitzgerald (who, as a state officeholder before his election to federal office, facilitated the Elector Defendants' entry into the State Capitol for their December 14, 2020, meeting, *see* FAC ¶133) joined numerous other Members of Congress to announce that they would object, on January 6, 2021, to the counting of the votes of electors from allegedly disputed states, including Wisconsin, *see* FAC ¶¶169–172;

(3) as the media reported widely that Vice President Pence was being pressured by President Trump and others to reject or delay the electoral count because of alternate slates submitted in Wisconsin and other states, *see* FAC ¶175;

(4) during the furor instigated by the January 6, 2021, insurrection and the interruption of the Joint Session of Congress to count the electoral votes; or

(5) at any time in the two-and-one-half years since, even as baseless criticisms of the validity of Wisconsin's 2020 presidential election have continued to roil public discourse in the state, *see* FAC ¶¶195–224.

Indeed, Defendant Troupis persisted in trying to transmit the Elector Defendants' fraudulent certificate to the Vice President as late as the morning of January 6, 2021. *See* FAC ¶¶153–155.

Finally, Defendants engaged in wrongful acts by violating Wis. Stat. § 939.05. This provision makes it unlawful to "be concerned in the commission of a crime," which occurs if a person (a) directly commits the crime; (b) intentionally aids and abets the commission of it; or (c) is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. As described above, the Elector Defendants engaged in behavior that is criminalized under § 946.69, and Defendant Chesebro and Troupis intentionally aided and abetted that behavior by drafting the certificate (Chesebro), advising and coordinating the Elector Defendants' efforts to sign it (both), and attempting to transmit it (Troupis). Moreover, as described above, all Defendants conspired together to produce and transmit the fraudulent

certificate pursuant to what Defendant Troupis termed "our strategy." FAC ¶122.

These allegations of wrongful conduct under state law satisfy the second element of the civil conspiracy cause of action.

2. Plaintiffs have alleged wrongful acts under federal law.

Plaintiffs have also alleged that Defendants engaged in wrongful acts under three federal laws, 18 U.S.C. §§ 1512(c)(2), 494, and 371. Section 1512(c)(2) prohibits corruptly "obstruct[ing], influenc[ing], or imped[ing] any official proceeding, or attempt[ing] to do so."[8] An official proceeding includes "a proceeding before the Congress." 18 U.S.C. § 1515(a)(1)(C); *see United States v. Fischer*, 64 F.4th 329, 342–43 (D.C. Cir. 2023) (January 6, 2021, Joint Session to count electoral votes was an "official proceeding" for purposes of § 1512(c)(2)). Section 1512(c)(2) requires a showing of "nexus," *i.e.,* that Defendants "believe[d] that [their] acts will be likely to affect a pending or foreseeable proceeding." *United States v. Matthews*, 505 F.3d 698, 708 (7th Cir. 2007) (citing *Arthur Anderson, LLP v. United States*, 544 U.S. 696, 707 (2005)). Acts are taken corruptly where they are done "wrongfully." *Id.* at 706; *see also id.* (rejecting defendant's request to define "corruptly" to mean "with an improper motive or with an evil or wicked purpose" and noting that to act "wrongfully" means to act without a "legal right").

18 U.S.C. § 494 proscribes the conduct of "[w]hoever falsely makes, alters, forges, or counterfeits any . . . public record, affidavit, or other writing for the purpose of defrauding the United States"; or, as relevant here, "[w]hoever transmits to, or presents at any office or to any officer of the United States, any such false, forged, altered, or counterfeited writing, knowing the

[8] Defendant Troupis's argument that Plaintiffs have failed to plead the elements of this wrongful act because "there is no allegation that the Congressional proceeding was indeed impended [sic], obstructed, or influenced by the specific act of casting alternative elector votes," Dkt. 191 at 29, is without merit, as the last clause of the provision expressly criminalizes attempts.

same to be false, forged, altered, or counterfeited." Defendants transmitted the false certificate and the cover letter that falsely characterized the certificate to officers of the United States, including the Archivist, thus satisfying the requirements of this wrongful act.

Defendant Troupis argues that this proscription cannot include the false certificate at issue because 18 U.S.C. § 494 proscribes only forgeries and not "genuinely executed documents that contain false statements." Dkt. 191 at 31 (citing *United States v. Merklinger*, 16 F.3d 670, 673 (6th Cir. 1994), which found that, at common law, the term "falsely makes" refers only to forgeries, and that § 494 should be read to encompass only the same). But this is wrong for two reasons. First, the certificate is a "false making."[9] The certificate, FAC Ex. G at 3–4, which was drafted by Defendant Chesebro, FAC ¶116, was made to look like the certificates that were signed by the real electors. *Compare id.*, *with* FAC Ex. F. Thus, the certificate was purposely falsely made to appear to be the true certificate of the electoral votes of the state of Wisconsin, and was represented to be such, with the intention of having it count. *See Carr v. United States*, 278 F.2d 702, 703 (6th Cir. 1960) (per curiam) ("The word 'forgery' is commonly defined as the false making or materially altering, with intent to defraud, of *any writing, which, if genuine, might apparently be of legal efficacy* or the foundation of a legal liability." (emphasis added) (citing *Wright v. United States*, 172 F.2d 310, 311 (9th Cir. 1949) ("A falsely made instrument is one that is fictitious, not genuine, or in some material particular something other than it purports

[9] While courts regularly seem to conflate the two, "falsely makes" and "forges" should not be construed to have the same meaning because both are proscribed by 18 U.S.C. § 494 and, when interpreting federal statutes, courts "assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning." *Bailey v. United States*, 516 U.S. 137, 146 (1995); *see also Moskal v. United States*, 498 U.S. 103, 109, 116–17 (1990) (declining to equate "falsely makes" and "forges" in the context of a different statute with identical language because of the "established principle that a court should give effect, if possible, to every clause and word of a statute" (internal quotation marks and citations omitted)).

to be and without regard to the truth or falsity of the facts stated therein."))). *See also Moskal v. United States*, 498 U.S. 103, 122 (1990) (Scalia, J., dissenting) ("[E]very instrument which fraudulently purports to be that which it is not is a forgery." (internal quotation marks, citation, and alteration omitted)).

Second, the U.S. Supreme Court has held with regard to a different statute containing identical language—18 U.S.C. § 2314, which prohibits the knowing transportation of "falsely made, forged, altered, or counterfeited securities" in interstate commerce—that "falsely made" encompasses "genuine documents containing false information," notwithstanding the common law meaning ascribed to the term. *Moskal*, 498 U.S. at 110. While the Sixth Circuit in the case Defendant Troupis cites held that this textual interpretation should not be applied to the identical language in § 494, because the two statutes have differing purposes, *Merklinger*, 16 F.3d at 674 n.4—*but see Moskal*, 498 U.S. at 114 (ascribing its interpretation to "*both* . . . the plain meaning of the words and . . . the legislative purpose underlying them" (emphasis added))—both the dissent in *Moskal*, *see supra*, and the Sixth Circuit in *Carr*, *see supra*, have recognized that the false certificate used here falls within the scope of a "forgery" or a "false making." *See also Quick Serv. Box Co. v. St. Paul Mercury Indem. Co.*, 95 F.2d 15, 16–17 (7th Cir. 1938) ("[T]o constitute forgery there must be a false making; . . . this might be accomplished by the fraudulent application of a false signature to a true instrument or a real signature to a false instrument . . . ."). Thus, even if the *Moskal* interpretation does not apply to § 494, it is nonetheless the case that Defendants' conduct here violated that section.

Finally, the general conspiracy statute, 18 U.S.C. § 371, imposes penalties "[i]f two or more persons conspire either to commit any offense against the United States, . . . and one or more of such persons do any act to effect the object of the conspiracy." The well-established

elements of this crime require (1) an agreement to commit an offense against the United States; (2) an overt act in furtherance of the conspiracy; and (3) knowledge of the conspiratorial purpose. *United States v. Jones*, 993 F.3d 519, 531 (7th Cir. 2021). It is not required, however, that members of a conspiracy "know . . . all the other coconspirators, nor do they have to participate in all aspects of the conspiracy." *Id.* at 532.

Plaintiffs' allegations about Defendants' conduct meet the elements of all three statutes. As alleged in the FAC, and as described in detail above, the scheme concocted by Defendant Chesebro, encouraged and facilitated by Defendant Troupis, and executed by the Elector Defendants was intended to interfere with the counting of electoral votes in Congress. It was also done "wrongfully" and without any "legal right," *Matthews*, 505 F.3d at 706, as evidenced by the fact that Defendants knew, when they signed and transmitted the certificate purporting to contain the "originals of Wisconsin's electoral votes for President and Vice President," FAC Ex. G at 1, that they were not the duly elected presidential electors. Moreover, even as Members of Congress, Trump campaign officials, and President Trump himself publicly discussed how they planned to use the alternate votes to disrupt the proceedings on January 6 and persuade Vice President Pence to reject the true electoral votes, Defendants did nothing to disclaim or withdraw their false certificate or to otherwise correct the record. FAC ¶¶165, 175, 180, 222.

C. Plaintiffs have satisfied the requisite pleading standard.

Defendants are simply wrong that Plaintiffs have failed to meet the heightened pleading standard associated with wrongful acts that sound in fraud. *See* Dkt. 186 at 21–23, Dkt. 191 at 5–6. As a preliminary matter, several of Plaintiffs' claims—including public nuisance and *quo warranto*—do not sound fraud. And even assuming, without conceding, that some of Plaintiffs' conspiracy predicates sound in fraud, Plaintiffs have met their burden of specifically pleading

"the time, place, and content of an alleged false misrepresentation," *Friends of Kenwood v. Green*, 2000 WI App 217, ¶14, 239 Wis. 2d 78, 619 N.W.2d 271 (internal quotation marks and citation omitted), and have done so as to each Elector Defendant. This is because, as alleged in the Complaint, each Elector Defendant, on December 14, 2020 (time), FAC ¶129, at the State Capitol (place), *id.*, attested to a document entitled "Certificate of the Votes of the 2020 Electors from Wisconsin, FAC ¶147 & Ex. G at 3–4, that contained the following misrepresentation (content): "We, the undersigned, being the duly elected and qualified Electors for President and Vice President of the United States of America, do hereby certify the following: . . . ." This statement is alleged to be false, FAC ¶148; indeed, it was false, *see* FAC ¶¶75–78 (describing actions of real electors, including Plaintiffs Penebaker and Arnold). And nowhere on the face of the certificate was an effort made to mitigate its falsity. *Compare* FAC Ex. G at 3–4, *with* FAC ¶127 (describing qualifying language added to alternate elector certificate in New Mexico). Nor did any Elector Defendant at any later point disavow or disclaim the falsity of the document they signed. FAC ¶¶222–224.

The Complaint also alleges that the certificate containing this misrepresentation was transmitted, with a cover letter, also dated December 14, 2020, from Defendant Hitt, specifying that he was sending "duplicate originals of Wisconsin's electoral votes for President and Vice President," FAC Ex. G at 1, to the President of the United States Senate, the Archivist of the United States, the Wisconsin Secretary of State, and the Chief Judge of the United States District Court for the Western District of Wisconsin. *See* FAC ¶150. Again, this cover letter contains representations that were alleged to be—and were in fact—false: the votes so transmitted were not "duplicate originals of Wisconsin's electoral votes." *Compare* FAC Ex. G at 1, *with* FAC ¶77 (describing transmission of certificates from real electors, including Plaintiffs Penebaker and

Arnold). And as with the certificate itself, there is no indication on the face of the cover letter that these representations were qualified in any way such that any official to whom the certificate was transmitted would have been made aware that it was not what it purported to be.

These allegations more than adequately plead "the details of where and when the misrepresentations were made, and who the misrepresentations were made to," *Friends of Kenwood*, 2000 WI App 217, ¶16, and they specify each Elector Defendant's role in that conduct. *See also Ferris v. Location 3 Corp.*, 2011 WI App 134, ¶11, 337 Wis. 2d 155, 804 N.W.2d 822 (denying motion to dismiss where allegations were sufficient to allow the Court to "know what the representation was, who made it, and where, when, and how it was made"). Nothing more is needed to satisfy the pleading standard for claims grounded in fraud.

D. Plaintiffs are not required to allege financial damages or actual malice.

Defendant Troupis makes a muted argument that Plaintiffs' conspiracy claim is preempted by Wis. Stat. § 134.01, which imposes criminal and civil liability for conspiring to "willfully or maliciously injur[e] another in his or her reputation, trade, business or profession by any means whatever." *See* Dkt. 191 at 22–23. Because a violation of § 134.01 requires a showing of malice and financial harm, Defendant Troupis argues, Plaintiffs must make such a showing here. *See id.* Defendant Troupis also argues that Plaintiffs must plead actual malice because they are public figures seeking damages for reputational injuries. *See id.* at 32–33.

These arguments fail. First, Plaintiffs do not allege that Defendants violated Wis. Stat. § 134.01, and thus do not need to satisfy the statute's elements. Defendant Troupis cites *Medline Industries, Inc. v. Diversey, Inc.*, 563 F. Supp. 3d 894 (E.D. Wis. 2021), for the proposition that "Section 134.01 preempts a common-law conspiracy claim," Dkt. 191 at 23, but that is not what *Medline Industries* held. Instead, *Medline Industries* held that § 134.01 was *one* way that a

plaintiff might bring a conspiracy claim, but that the plaintiff did not satisfy the statute's elements and so could not take advantage of that statutory route. 563 F. Supp. 3d at 923. The court separately analyzed whether plaintiff had pleaded a claim for *common law* conspiracy to commit tortious interference, ultimately concluding plaintiff had not because plaintiff did not state a claim for tortious interference or any other viable predicate. *See id.* There is simply nothing in the opinion about preemption. Furthermore, the Wisconsin Supreme Court held in *Singer*, 245 Wis. at 198–99, that injuries to the plaintiff's character were actionable in a civil conspiracy suit, and there was no mention in the opinion of the then-operative predecessor to § 134.01, *see* Wis. Stat. § 343.681 (1943). Finally, as explained in the context of Defendant Troupis's immunity arguments, *see* Section VII.A, *infra*, Plaintiffs are not bringing a defamation claim and do not need to allege actual malice. Even if they did, though, Plaintiffs would meet that standard: as just discussed, Plaintiffs have alleged that the statements made in Defendants' certificate—and in the cover letter with which the certificate was transmitted to state and federal officials—were knowingly false. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964) (defining "actual malice" as statement made "with knowledge that it was false or with reckless disregard of whether it was false or not").

E. WEC does not have exclusive authority to review Plaintiffs' claims.

Finally, Defendants argue that the Wisconsin Elections Commission ("WEC") has exclusive authority over some of Plaintiffs' claims. Dkt. 186 at 25–27; Dkt. 191 at 25. But while WEC's enforcement power is the "exclusive remedy for alleged civil violations" of most Wisconsin election laws, Wis. Stat. § 5.05(2m)(k), Plaintiffs' claims sound in conspiracy, public nuisance, and quo warranto. WEC has no jurisdiction, let alone *exclusive* jurisdiction, over such claims. *Cf. Byers v. LIRC*, 208 Wis. 2d 388, 390–91, 561 N.W.2d 678 (1997) (exclusive remedy

under Worker's Compensation Act "does not bar a claimant whose claim is covered under the [Act] from pursuing" discrimination claim under different law, even if "the facts that are the basis for the discrimination claim might also support a worker's compensation claim").

III. Plaintiffs have stated a claim for public nuisance.

Counts Two and Three of the FAC allege that Defendants engaged in conduct that constitutes a public nuisance under Wisconsin law. To state a claim for public nuisance, Plaintiffs must show that Defendants "substantially or unduly interfere[d] with the use of a public place or with the activities of an entire community." *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 2002 WI 80, ¶21, 254 Wis. 2d 77, 646 N.W.2d 777 (footnote omitted). Plaintiffs allege that Defendants created a public nuisance by falsely assuming—and conspiring with, aiding, and abetting others in falsely assuming—the office of presidential elector. In doing so, Defendants "interfered with every voter's interest in his or her right to exercise the franchise," set "an anti-democratic precedent that jeopardizes all future elections inside and outside the State," and "undermined Wisconsin voters' faith in the democratic process and their trust in the State's political institutions." FAC ¶¶276–278. Defendants deny that their conduct constitutes a public nuisance, and they contest Plaintiffs' ability to bring such a claim or seek an injunction. *See* Dkt. 191 at 33–38; Dkt. 186 at 27–29. This Court should reject Defendants' cramped conception of public nuisance and deny their request to dismiss Plaintiffs' claims.

A. Plaintiffs have alleged an injury peculiar to them.

Defendant Troupis argues in a footnote that Plaintiffs cannot bring a public nuisance claim because they have not alleged an injury peculiar to them "as distinguished from all other voters." Dkt. 191 at 34 n.15. As discussed above, however, the Elector Defendants' false assumption of the office of presidential elector uniquely undermined the legitimacy of the ten

individuals duly elected to that office, including Plaintiffs Penebaker and Arnold. *See* FAC ¶¶285–288. When Defendants falsely assumed the office to which the duly elected presidential electors were entitled, Plaintiffs Penebaker and Arnold "sustained damage differing not merely in degree, but in kind, from the damage sustained by the general public." *Tilly v. Mitchell & Lewis Co.*, 121 Wis. 1, 5, 98 N.W. 969 (1904). Because the reputational injury suffered by the duly elected presidential electors was "traceable directly to the public nuisance, and not common to the public in general," *id.* at 8–9, it satisfies the requirements that Wisconsin courts have long imposed—and that Wis. Stat. § 823.01 currently imposes—for private individuals seeking to bring public nuisance claims.

Furthermore, as alleged in the FAC, Plaintiffs have also sought leave to bring a public nuisance action in the name of the State under Wis. Stat. § 823.02. Unlike § 823.01, § 823.02 does not require Plaintiffs to show a peculiar injury. *See State ex rel. Cowie v. La Crosse Theaters Co.*, 232 Wis. 153, 157, 286 N.W. 707 (1939) (explaining that plaintiffs granted leave of court may proceed under Wis. Stat. § 823.02's predecessor, § 280.02, without a showing of peculiar injury). Accordingly, if the Court grants leave, *see* Dkt. 14, all Plaintiffs have standing to proceed under Wis. Stat. § 823.02 based on their injuries as voters and taxpayers.

B. Public nuisance is a flexible cause of action that allows plaintiffs to seek relief for injuries caused by Defendants' misconduct.

Public nuisance claims afford relief where defendants "substantially or unduly interfere[] with the use of a public place or with the activities of an entire community." *Physicians Plus*, 2002 WI 80, ¶21. As the FAC explains, Defendants did just that when they assembled a slate of false electors and attempted to cast Wisconsin's electoral votes for the losing presidential and vice-presidential candidates. Defendant Troupis argues that public nuisance claims cannot redress violations of political or voting rights. Dkt. 191 at 34. But Wisconsin courts have long

articulated a flexible view of public nuisance, and Counts Two and Three of the FAC fall comfortably within the range of public nuisance claims that Wisconsin courts have recognized.

The Supreme Court's decision in *State v. Texaco, Inc.*, 14 Wis. 2d 625, 111 N.W.2d 918 (1961), is instructive on this point. There, the court held that the complaint stated a claim for public nuisance based on allegations that Texaco engaged in unfair competition by giving illegal rebates to gasoline dealers. *See id.* at 632.[10] Texaco had taken a nearly identical position to Defendants in this case, arguing that "the concept of public nuisance does not embrace continuous violation of laws or regulations prohibiting unfair methods of competition or trade practices, unless the conduct interferes with public health, safety or morals." *Id.* at 639 (Fairchild, J., concurring in the result). But the court's holding necessarily rejected that position, and Justice Fairchild's concurring opinion explained why Texaco's view was mistaken. Justice Fairchild conceded that "the leading cases in Wisconsin on this subject did involve activities more directly related to public morals and to public health than the distribution of gasoline," but, he reasoned, "the language of those decisions did not so limit the concept of public nuisance." *Id.* (footnotes omitted). To the contrary, Justice Fairchild explained, Texaco's conduct constituted a public nuisance because "[t]he policy of the state against monopoly, unfair methods of competition, and unfair trade practices is important, and continued violation of laws implementing that policy broadly affects the economic interests of the general public." *Id.* Defendants' conduct can be analyzed similarly: the policy of the state against the false assumption of office—including elective office—is important, and continued violation of laws implementing that policy broadly affects the interests of the general public in participating in democratic processes. *Cf.* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in*

[10] The court applied Wis. Stat. § 823.02's predecessor, Wis. Stat. § 280.02 (1961).

State Constitutions, 119 Mich. L. Rev. 859 (2021) (arguing that state constitutions, including Wisconsin's, feature a robust commitment to democratic principles, specifically majority rule, popular sovereignty, and political equality).

Other cases likewise recognize a flexible conception of public nuisance. In *State v. J.C. Penney Co.*, 48 Wis. 2d 125, 155, 179 N.W.2d 641 (1970), for example, the Supreme Court held that the defendant department store's use of revolving charge accounts that charged interest in excess of the statutory maximum constituted a public nuisance. Although the practice of charging excessive interest may not be the most "directly related to public morals and to public health," *Texaco, Inc.*, 14 Wis. 2d at 639 (Fairchild, J., concurring in the result) (footnotes omitted), the Court explained in light of "the widespread use of the revolving charge account and of the large number of Wisconsin citizens affected by these practices" that it "ha[d] no hesitancy in endorsing an injunction against the usurious practices which clearly constitute a public nuisance here and should be discontinued." *J.C. Penney Co.*, 48 Wis. 2d at 155. More recently, in *State v. Schweda*, 2007 WI 100, ¶32, 303 Wis. 2d 353, 736 N.W.2d 49, the Supreme Court explained that "nuisance is a sprawling concept," and that "[h]istorically, 'nuisance' has been a term so broad that it could encompass a vast array of causes of action."

Just as the economic interests of Wisconsin citizens can be vindicated through a public nuisance claim, so too can their interests in their right to vote, "which the law protects and enforces as jealously as it does property in chattels or land." *Phelps*, 144 Wis. at 15 (internal quotation marks and citation omitted); *see State ex rel. Bell v. Conness*, 106 Wis. 425, 428, 82 N.W. 288 (1900) ("The purity and integrity of elections is a matter of . . . prime importance, and affects . . . many important interests . . . ."). By falsely assuming the office of presidential elector, and by conspiring to have their fake electoral votes counted, Defendants threatened to

nullify not just the votes of those who cast their ballots in favor of the winning presidential and vice-presidential candidates, but also those of the entire Wisconsin electorate. After all, Defendants sought to have their fake electoral votes counted on January 6, 2021, without regard for who actually won the popular vote. As far as Defendants were concerned, it did not matter that an historic 3.3 million Wisconsinites turned out to vote in the 2020 presidential election; these engaged citizens might as well have stayed home.

In addition to interfering with every Wisconsinite's right to vote, Defendants undermined the electorate's faith in the democratic process by attempting, for the first time ever, to divorce the electoral vote from the results of the statewide presidential election. *See* FAC ¶28 (explaining that Wisconsin has, since statehood, cast its electoral votes for the winner of the popular vote in the State). In doing so, Defendants set an anti-democratic precedent that jeopardizes all future elections in Wisconsin. As the U.S. Supreme Court has explained, "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). If Wisconsinites believe that their votes can be overridden by partisan actors, they will have little incentive to show up on election days and little faith in the legitimacy of their government. Indeed, as detailed in the FAC, most registered Wisconsin voters reported being "very concerned" about the accuracy of the casting and counting of votes in the 2022 midterm elections. *See* FAC ¶216.

The upshot is that Defendants have failed to identify any constraints on Wisconsin's cause of action for public nuisance that would render it inapplicable here. If the violation of unfair competition laws or the practice of charging excessive interest can ground a public nuisance claim, so too can attempts to undermine Wisconsin's electoral process. It is difficult to imagine a more "substantial[] or undu[e] interfere[nce] with the . . . activities of an entire

community," *Physicians Plus*, 2002 WI 80, ¶21, than a threat to the foundations of, and confidence in, our democracy. And to the extent no reported decision exists that involves a similar claim for public nuisance in Wisconsin, it is because no one has ever tried to execute a scheme like the one Defendants concocted in the fall of 2020.

C. Plaintiffs have adequately alleged that Defendants' actions constituted a public nuisance per se.

For the reasons just discussed, Plaintiffs have stated a claim for public nuisance. In addition, because Defendants repeatedly violated various criminal prohibitions, their actions constituted a public nuisance per se. *See State v. H. Samuels Co.*, 60 Wis. 2d 631, 637, 211 N.W.2d 417 (1973). Defendant Troupis argues that "Plaintiffs allege a singular event on December 14, 2020, not repeated violations." Dkt. 191 at 35. But Defendants' alleged violations began with the formation of their unlawful plan to have the Elector Defendants falsely assume the office of presidential elector. *See State v. Moffett*, 2000 WI App 67, ¶13, 233 Wis. 2d 628, 608 N.W.2d 733, *aff'd*, 2000 WI 130, ¶13, 239 Wis. 2d 629, 619 N.W.2d 918 (recognizing that conspiracy "is complete when there is an agreement and an initial overt act in furtherance of the agreement"). And they continued through: the execution of the false certificates on December 14, 2020; the actual and attempted transmission of those certificates to officers of the United States afterwards, *see* 18 U.S.C. § 494; Defendant Troupis's attempted transmission to Pence on January 6, 2021; and all Defendants' continuing failure to denounce the false elector scheme or to disclaim the fraudulent certificate they had a role in submitting on behalf of Wisconsin.

D. Defendant Troupis's arguments regarding Plaintiffs' request for injunctive relief are premature and meritless.

For similar reasons, Defendant Troupis is incorrect that Plaintiffs have failed to allege facts warranting an injunction. *See* Dkt. 191 at 35–37. As a preliminary matter, the propriety of

injunctive relief is an intensely factual issue ill suited to resolution at the motion-to-dismiss stage. *See Pure Milk Prods. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979) ("[I]njunctive relief is addressed to the sound discretion of the trial court; competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction."). More fundamentally, Defendant Troupis is incorrect that "sweeping changes to the Electoral Count Act," Dkt. 191 at 36, prevent Plaintiffs from "show[ing] a sufficient probability that future conduct of the defendant will violate a right of will and injure the plaintiff," *Pure Milk*, 90 Wis. 2d at 800. The FAC alleges that Plaintiffs are *currently* suffering injuries as a result of Defendants' failure to disavow their prior actions. *See, e.g.*, FAC ¶288. It also alleges a significant probability that Defendants will inflict these injuries on Plaintiffs again, FAC ¶¶219, 289, 301—a risk amplified by Defendants' refusal to recognize that they did anything wrong, *id.* ¶¶222–224. *See supra* n.2 (discussing then-Attorney Edward G. Ryan's warnings regarding the danger of unchecked political usurpation). And although the Electoral Count Act made changes to the administration of federal elections, it did not alleviate the risk that Defendants will conspire again to falsely assume the office of presidential elector.

E. Plaintiffs' claims are not moot.

Finally, Defendants argue that Plaintiffs' request for declaratory and injunctive relief (but not for damages) is moot. *See* Dkt. 186 at 29; Dkt. 191 at 37–38. As just discussed, however, Plaintiffs are currently suffering harms as a result of Defendants' failure to disavow their actions, and there is a significant risk that Defendants will repeat their actions in the future. Furthermore, even if Plaintiffs' requests for equitable relief were moot (they are not), this Court should "overlook mootness" given that "the issue is of great public importance," "is likely to recur and must be resolved to avoid uncertainty," and "is [capable and] likely of repetition and evades

review." *Marathon Cnty. v. D.K.*, 2020 WI 8, ¶19, 390 Wis. 2d 50, 937 N.W.2d 901. Defendants suggest the case is moot because "the 2020 Presidential Election is over," Dkt. 186 at 29; *see* Dkt. 191 at 37, but given the nature of their scheme, there was no guarantee Plaintiffs could obtain meaningful review before Defendants had cast and transmitted their fake electoral votes.

IV. Plaintiffs have stated a claim for *quo warranto*.

Plaintiffs have adequately pled their *quo warranto* claim. Such a claim is appropriate "[w]hen any person shall usurp, intrude into or unlawfully hold or exercise any public office." Wis. Stat. § 784.04(1)(a). The Attorney General is charged with bringing a *quo warranto* action in the first instance, but a private person may bring the action on behalf of the State "when the attorney general refuses to act." *Id.* § 784.04(2). A private plaintiff bringing a *quo warranto* action "must show that he has sustained or is in danger of sustaining injury as a result of the challenged action, and he must show a special interest." *City of Waukesha v. Salbashian*, 128 Wis. 2d 334, 349, 382 N.W.2d 52 (1986) (internal quotation marks omitted). But "only a slight interest is necessary to qualify a person to apply for leave to prosecute the action." *Id.* (internal quotation marks omitted).

Here, the Elector Defendants usurped the office of presidential elector for Wisconsin by falsely assuming that office. *See, e.g.*, FAC ¶¶129–159. Plaintiffs requested that the Attorney General bring a *quo warranto* action, *see id.* Ex. H, and when the Attorney General declined, *see id.* Ex. I, Plaintiffs brought the action on behalf of the State. Plaintiffs have sustained and continue to sustain injuries as a result of the Elector Defendants' usurpation. *See id.* ¶312. And Plaintiffs have a special interest because two are entitled to the office of presidential elector, and all are Wisconsin taxpayers and voters. *See id.* ¶¶313–314. Plaintiffs have thus alleged the elements of a *quo warranto* claim.

The Elector Defendants argue that Plaintiffs' *quo warranto* claim fails for four reasons. According to the Elector Defendants: (1) the office of presidential elector is not a "public office" within the meaning of Wis. Stat. § 784.04(1)(a); (2) the Elector Defendants did not usurp that office; (3) Plaintiffs failed to allege an injury or special interest; and (4) Plaintiffs' claim is moot. Dkt. 186 at 32–34. Each of these arguments is incorrect.

Beginning with the question whether the office of presidential elector is a "public office," the Elector Defendants make a four-sentence argument that is difficult to decipher. They cite to the Wisconsin Supreme Court's decision in *Burton v. State Appeal Board*, 38 Wis. 2d 294, 156 N.W.2d 386 (1968), which lists criteria for determining whether a position is a public office. And they suggest (but do not say) that the office of presidential elector fails to satisfy some or all of these criteria, including that a public office "possess sovereign power of the government, have permanency and continuity, and be entered upon by taking an oath." Dkt. 186 at 32–33. Rather than analyzing the criteria further, the Elector Defendants conclude by stating: "As such, neither the GOP Electors or [sic] the Democratic Party electors held public office." *Id.* at 33.

To clarify, the relevant office the Elector Defendants usurped is not that of *nominee* for presidential elector; it is that of presidential elector *itself*. And the office of presidential elector possesses the sovereign power of the State. *See* U.S. Const. art. II, § 1, cl. 2 (empowering each State to appoint electors "in such Manner as the Legislature thereof may direct"); *Ray v. Blair*, 343 U.S. 214, 224–25 (1952) (explaining that presidential electors "act by authority of the state that in turn receives its authority from the federal constitution"). To the extent that the Elector Defendants meant to argue that the office of presidential elector is not a public office because it does not satisfy other criteria from *Burton*, that argument fails as well. The *Burton* criteria—drawn from the Wisconsin Supreme Court's decision in *Martin v. Smith*, 239 Wis. 314, 1

N.W.2d 163 (1941)—are not independently necessary or entitled to equal weight. *See Burton*, 38 Wis. 2d at 303 (suggesting that certain criteria "are not indispensable," even if "they are the usual characteristics of an office" (internal quotation marks omitted)); 77 Wis. Op. Att'y Gen. 256, 261 (1988) ("For a position to be a public office, it need not meet all of the *Martin* criteria."). Instead, "the principal consideration determining whether a position is an office and one holding it is an officer is the type of power that is wielded." *Burton*, 38 Wis. 2d at 300. Namely, for a position to be a public office, it must exercise "some portion of the sovereign power of the state in the exercise of which the public has a concern." *Martin*, 239 Wis. at 332; *see Burton*, 38 Wis. 2d at 304 (emphasizing the importance of exercising "the functions of sovereignty" (internal quotation marks omitted)); 77 Wis. Op. Att'y Gen. at 261 ("[P]ossession of 'a delegation of the sovereign power of government to be exercised for the benefit of the public' has been recognized as the *sine qua non* for public office." (quoting *Martin*, 239 Wis. at 332)). And as just discussed, presidential electors exercise the sovereign power of the State.

As a final point, presidential electors are described as public officers throughout the Wisconsin Statutes. Wisconsin Stat. § 939.22(30), for example, defines a "public officer" as "any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units." This definition encompasses presidential electors. Relatedly, Wis. Stat. § 17.19 prescribes the process for filling "[v]acancies in elective state offices," including "the office of presidential elector." And Wis. Stat. § 8.25 governs the "[e]lection of state and federal officers," including "[p]residential electors." These statutory references confirm that presidential electors are public officers.

The Elector Defendants' second argument—that even if the office of presidential elector is a public office, they did not usurp that office—warrants little discussion. The Elector

Defendants concede that usurpation "refers to the 'unlawful seizure and assumption of another's position, office, or authority.'" Dkt. 186 at 33 (quoting *Usurpation*, *Black's Law Dictionary* (11th ed. 2019)). And, as the FAC describes, the Elector Defendants unlawfully assumed the office of presidential elector for Wisconsin. *See, e.g.*, FAC ¶¶129–159. Their only response is that they "were duly nominated to be presidential electors," and that "[o]ne cannot usurp a nomination that he or she has the statutory right to hold." Dkt. 186 at 33. As discussed above, however, the relevant office that they usurped is not that of nominee for presidential elector; it is that of presidential elector itself. And the Elector Defendants offer no explanation for how their unlawful assumption of that office did not constitute usurpation. (Indeed, they appear to concede that they usurped the office of elector, writing that they "voted *as presidential electors* on December 14, 2020, and, thereafter, submitted their votes." *Id.* (emphasis added).)

The Elector Defendants' third argument, that Plaintiffs did not allege an injury or special interest, fails for similar reasons. As the duly elected presidential electors for Wisconsin, Plaintiffs Penebaker and Arnold are natural plaintiffs for a *quo warranto* action against individuals who usurped that office. The Elector Defendants argue that "there is no allegation of any usurpation" because "Plaintiffs were not entitled (and do not allege to be entitled) to be presidential electors for the Republican Party." *Id.* at 34. But again, the relevant office is that of elector, not that of nominee. The Elector Defendants are also incorrect that Plaintiffs' interest as Wisconsin taxpayers and voters "is not a special interest as a matter of law." *Id.* (citing *State ex rel. First Nat'l Bank of Wis. Rapids v. M & I Peoples Bank of Coloma*, 95 Wis. 2d 303, 311, 290 N.W.2d 321 (1980)). To the contrary, the Supreme Court said in *City of Waukesha* that "the pecuniary interest of a landowner-taxpayer is sufficient to confer standing in a *quo warranto*

action." 128 Wis. 2d at 351. And the Elector Defendants have offered no explanation for why voter-taxpayers should be treated differently.

Finally, the Court should reject the Elector Defendants' argument that Plaintiffs' claim is moot. The Elector Defendants argue that "[q]uo warranto remedies are applied only to on-going exercises of power," Dkt. 186 at 34, and they cite several decisions from courts in other States. In Wisconsin, however, the *quo warranto* statute makes clear that, "[w]hen the action shall not be terminated during the term of the office in controversy it may notwithstanding be prosecuted to completion and judgment rendered, which shall determine the right which any party had to the office." Wis. Stat. § 784.08. Additionally, the statute authorizes the recovery of damages for harms that a usurper inflicted retrospectively. *See id.* § 784.11. The text of the statute therefore makes clear that *quo warranto* actions survive the termination of a defendant's usurpation.

V. Plaintiffs are entitled to punitive damages.

As explained in the FAC, Wisconsin law allows for punitive damages where a defendant has acted in intentional disregard of the plaintiff's rights. Wis. Stat. § 895.043(3). A defendant acts in intentional disregard if he or she "acts with a purpose to disregard the plaintiff's rights, or is aware that his or her acts are substantially certain to result in the plaintiff's rights being disregarded." *Strenke v. Hogner*, 2005 WI 25, ¶38, 279 Wis. 2d 52, 694 N.W.2d 296. Additionally, for punitive damages to be warranted, the defendant's "act or conduct must actually disregard the rights of the plaintiff, whether it be a right to safety, health or life, a property right, or some other right," and "the act or conduct must be sufficiently aggravated to warrant punishment by punitive damages." *Id.* An award of punitive damages does not require that the defendant intended to cause harm or injury to the plaintiff. *See Wischer v. Mitsubishi Heavy Indus. Am., Inc.*, 2005 WI 26, ¶24, 279 Wis. 2d 4, 694 N.W.2d 320. Indeed, "a

defendant's conduct giving rise to punitive damages need not be directed at the specific plaintiff seeking punitive damages." *Strenke*, 2005 WI 25, ¶51.

Plaintiffs have adequately alleged that Defendants acted in intentional disregard of their rights. *See* FAC ¶¶318–331. Plaintiffs Penebaker and Arnold had a right to serve as the duly elected presidential electors for the State of Wisconsin. And all Plaintiffs had a right to cast their votes free from unlawful election interference, as well as a right to have their taxpayer dollars used only for lawful expenditures. Defendants were aware that by falsely assuming—and conspiring with, aiding, and abetting each other in falsely assuming—the office of presidential elector for the State of Wisconsin, they were substantially certain to cause these rights to be disregarded. All Defendants planned and prepared for the Elector Defendants to meet on December 14, 2020, to use public resources, and to purport to cast Wisconsin's electoral votes, even though they knew that the Elector Defendants were not the duly elected presidential electors for the State of Wisconsin. And this conduct was sufficiently aggravated to warrant punishment. *See, e.g.*, FAC ¶¶278–279 (explaining how Defendants "helped lay the foundation for a nationwide scheme to override the results of the 2020 election, thereby setting an anti-democratic precedent that jeopardizes all future elections inside and outside the State," and how Defendants "continue to threaten the integrity of representative government in Wisconsin because they have failed to disavow their misconduct"). Punitive damages are thus appropriate.

Defendants quibble primarily with Plaintiffs' decision to include their request for punitive damages not just in their Prayer for Relief, but also as a Count in the Complaint. *See* Dkt. 186 at 32; Dkt. 191 at 38–39. Defendants do not dispute, however, that punitive damages are available for the intentional disregard of a plaintiff's rights. *See id.* Their only substantive response to Plaintiffs' request for punitive damages is to assert again they have done nothing

wrong. *See* Dkt. 186 at 32 ("[S]ince the GOP Electors acted lawfully and since all of the other claims fail, so too does a request for punitive damages."); Dkt. 191 at 38 ("Plaintiffs have failed to allege Troupis committed any wrongdoing or in any way disrupted Plaintiffs' rights . . . ."). As explained throughout this brief, Defendants are incorrect.

VI. If the Court finds Plaintiffs' requested remedies are inadequate, it may fashion an appropriate one under Article I, Section 9 of the Wisconsin Constitution.

Defendants characterize Count Six of the Complaint as a request for the Court to become a "roving commission" that can "fashion a claim" of its own. Dkt. 186 at 30, 32. But Plaintiffs ask only that the Court use its established powers to fashion a *remedy* that redresses Plaintiffs' injuries, in the event that no adequate remedy exists. And the Supreme Court has made clear that, "[w]hen an adequate remedy or forum does not exist to resolve disputes or provide due process, the courts, under the Wisconsin Constitution, can fashion an adequate remedy." *Thomas*, 2005 WI 129, ¶128 (internal quotation marks omitted).

Nearly 40 years ago, in *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 342 N.W.2d 37 (1984), the Supreme Court used its Article I, Section 9 authority to fashion a remedy for victims of diethylstilbestrol (DES) exposure, who could not identify the company that produced or marketed the DES that injured them. Although these victims would have faced an "insurmountable obstacle" if they had been required to prove that defendants were the legal cause of their injuries, *id.* at 182, the court—relying on its powers under Article I, Section 9—held that they could recover against any company that "contributed to the *risk* of injury to the public" during the relevant period, *id.* at 191. *Collins* did not create new rights or causes of action, as the victims were still required to prove the other elements of either negligence or strict liability. *Id.* at 195–96. Rather, the decision reflected an effort to ensure that the victims were not "without remedy." *Id.* at 183. Decades later, the court expanded its *Collins* decision to lead

poisoning claims brought against lead pigment manufacturers. *See Thomas*, 2005 WI 129, ¶175. In doing so, the court explained that "the Article I, Section 9 provision itself may not create 'new rights,'" but "it does allow for a remedy through the existing common law." *Id.* ¶129.

That Article I, Section 9 permits courts to fashion adequate remedies is firmly established and uncontroversial. Indeed, Defendants concede as much, pointing out that the section "generally grants authority to the courts '[w]hen an adequate remedy or forum does not exist to resolve disputes or provide due process.'" Dkt. 186 at 30 (quoting *In re Paternity of John R. B.*, 2004 WI App 21, ¶17, 269 Wis. 2d 543, 674 N.W.2d 681 (unpublished)). Recent cases have done nothing to disturb this authority. Defendants point to *State v. Henley* to suggest that courts' power under Article I, Section 9 is constrained and inapplicable to this case. Dkt. 186 at 31. But *Henley* involved a criminal matter and had no impact on the doctrine established in *Collins* and reaffirmed in *Thomas*. *See* 2010 WI 97, ¶4, 328 Wis. 2d 544, 787 N.W.2d 350. As the U.S. Court of Appeals for the Seventh Circuit recently explained, Wisconsin courts' use of Article 1, Section 9 to ensure plaintiffs a "sufficient remedy" falls well within state courts' "need to adjust the common law as new cases are presented." *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 623 (7th Cir. 2014). There is nothing unusual, let alone tyrannical, in such a practice. Contrary to Defendants' suggestions, "hundreds of years of jurisprudence," Dkt. 186 at 30, do not disturb this power. *See, e.g.*, *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001) ("In the context of common law doctrines . . . , there often arises a need to clarify or even to reevaluate prior opinions. . . . The common law, in short, presupposes a measure of evolution that is incompatible with stringent application of *ex post facto* principles.")

Defendants also suggest that Plaintiffs have failed to establish their injuries because the harms they suffered are not "serious and actual," Dkt. 186 at 31, but the FAC details a host of

legally cognizable injuries, *see* Section I, *supra*. Defendant Troupis also argues that Plaintiffs have an adequate remedy because "they could have sought sanctions for his 'frivolous' arguments" in *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568. Dkt. 191 at 39. But Plaintiffs were not parties in *Trump*, and they do not seek redress for frivolous arguments that Defendant Troupis made in that case. Instead, they allege that he aided and abetted the Elector Defendants in causing Plaintiffs' injuries. If the Court finds that no remedy exists under Plaintiffs' other causes of actions, it may exercise its Article I, Section 9 authority to fashion one.

VII. Defendants' remaining arguments are meritless.

A. Defendant Troupis is not entitled to legal immunity.

In addition to the arguments discussed above, Defendant Troupis argues that he cannot be held liable for any of his alleged misconduct because he is being "sued in his official capacity as 'one of the lead lawyers for the Trump[-Pence] campaign in Wisconsin,'" Dkt. 191 at 6 (quoting FAC ¶14), and because, in that "official capacity," he made various statements in judicial proceedings for which he cannot be sued, *see id.* at 8–10. But Defendant Troupis's occupation as a lawyer does not exempt him from the general obligations imposed by state and federal law, and his arguments are unsupported by Wisconsin law, including the cases on which he relies. If adopted, Defendant Troupis's theory of legal immunity would grant lawyers a sweeping license to violate the law simply because they are members of the Bar.

Beginning with Defendant Troupis's argument that his role as a lawyer immunizes him from liability, although "an attorney is to a large degree immune from liability for acts performed in the discharge of his or her professional duties," this immunity "is qualified rather than absolute." *Strid v. Converse*, 111 Wis. 2d 418, 428–29, 331 N.W.2d 350 (1983) (internal

quotation marks and citation omitted); *see* Dkt. 191 at 6 (citing *Strid*, 111 Wis. 2d at 430). Indeed, *Strid* made the limits of legal immunity quite clear:

> The immunity from liability to third parties extends to an attorney who pursues in good faith his or her client's interests on a matter fairly debatable in the law. However, the immunity does not apply when the attorney acts in a malicious, fraudulent or tortious manner which frustrates the administration of justice or to obtain something for the client to which the client is not justly entitled.

Id. at 429–30; *see also Tensfeldt v. Haberman*, 2009 WI 77, ¶63, 319 Wis. 2d 329, 768 N.W.2d 641 (quoting same); *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 242, 517 N.W.2d 658 (1994) ("The qualified immunity falls away . . . when an attorney acts in a malicious, fraudulent, or tortious manner which frustrates or perverts the administration of justice.").[11]

Plaintiffs allege that Defendant Troupis did not act in good faith when he conspired with, aided, and abetted the Elector Defendants in their false assumption of the office of presidential elector; that the lawfulness of Defendants' actions was not fairly debatable; and that Defendant Troupis acted tortiously and frustrated the administration of justice when he tried to obtain for his client—Trump—something to which he was not entitled—Wisconsin's electoral votes. *Cf. Eastman v. Thompson*, 594 F. Supp. 3d 1156, 1187–95 (C.D. Cal. 2022) (finding that Trump and his attorney John Eastman likely attempted to obstruct an official proceeding, in violation of 18 U.S.C. § 1512(c)(2), and likely conspired to defraud the United States, in violation of 18 U.S.C. § 371, by attempting to interfere with the election certification process and the counting of

[11] Defendant Troupis cites *Goerke v. Vojvodich*, 67 Wis. 2d 102, 226 N.W.2d 211 (1975), for the proposition that a "lawyer must have intended to deceive [a] non-client" in order for the non-client's lawsuit to overcome legal immunity. Dkt. 191 at 10. But *Goerke* held only that: "In those cases of arm-length negotiations leading to the consummation of a contract such as in the case here, before liability can be imposed upon the attorney for the opposing party to the contract it must be shown that the attorney actually intended to mislead or misinform the other party and, in fact, does so to the detriment of that party." 67 Wis. 2d at 108. It said nothing about cases, such as this one, in which a person who happens to be a lawyer takes unlawful actions that injure non-clients outside the narrow context of contract negotiations.

electoral votes on January 6, 2021). Defendant Troupis spends several pages of his brief attempting to defend the lawfulness of his scheme to overturn the election results. *See* Dkt. 191 at 11–16. But his recitation of the Trump campaign's recount request, the ensuing litigation, and the efforts to pursue all legal avenues to victory are irrelevant. Most relevant to Plaintiffs' claims are the facts that the Elector Defendants met at the State Capitol on December 14, 2020, executed documents falsely certifying that they had cast votes for Trump and Pence as "the duly elected and qualified Electors for President and Vice President of the United States of American from the State of Wisconsin," and transmitted those documents to state and federal officials. These actions violated a number of laws. Because Defendant Troupis helped to coordinate this illegal activity, *see* FAC ¶¶118–119, 122–123, and attempted to transmit the fraudulent documents himself as late as the morning of January 6, 2021, FAC ¶¶153–155, he conspired to violate a number of laws as well. Contested historical analogies, *see* Dkt. 186 at 10–11; Dkt. 191 at 13 (discussing the 1960 presidential election in Hawaii), or the possibility that there may have been legal ways for Defendants to preserve the options of the Trump-Pence campaign, shed no light on the legality of the actions that these Defendants actually took. By falsely holding themselves out as the presidential electors for the State of Wisconsin and trying to have their purported votes counted, the Elector Defendants—and those who conspired with, aided, and abetted them—violated the law and caused injury to Plaintiffs.[12]

[12] Defendant Troupis argues that his actions "deceived no one," Dkt. 191 at 14 (capitalization omitted), but as noted above, *see supra* n.11, there is no general requirement that a non-client prove deceit in order to overcome legal immunity. Defendant Troupis also argues that the Wisconsin Department of Justice (WDOJ) "found that there was not even a 'reasonable suspicion' that the Defendant Electors violated Wisconsin law." Dkt. 191 at 16 (quoting Dkt. 196 at 10). But the WDOJ memo that Troupis references evaluated only whether the Elector Defendants violated Wis. Stat. §§ 5.10 and 7.75. *See* Dkt. 196 at 11. The memo did not address any of the other violations that Plaintiffs allege. And with respect to Wis. Stat. §§ 5.10 and 7.75, Plaintiffs respectfully disagree with WDOJ's analysis.

Finally, Defendant Troupis argues that he is absolutely immune from all liability in this case because he made statements in legal filings regarding his scheme to overturn the election. *See* Dkt. 191 at 8–10. This is another attempt to extend a limited legal protection beyond its bounds. Defendant Troupis is correct that "defamatory words published or spoken by parties, witnesses and counsel in judicial proceedings are . . . privileged when the statements bear a proper relationship to the issues." *Hartman v. Buerger*, 71 Wis. 2d 393, 399, 238 N.W.2d 505 (1976). And if Plaintiffs had sued Defendant Troupis for defaming them in a court filing, he likely would have had a valid defense based on *Hartman*. But that is not what Plaintiffs did. Instead, Plaintiffs sued Defendant Troupis for conspiring with, aiding, and abetting the Elector Defendants in their false assumption of office—outside the context of any judicial proceeding. Defendant Troupis cannot immunize himself from this actionable conduct by pointing to statements he made in court that would not themselves be grounds for liability.

Defendant Troupis also argues that he is entitled to absolute immunity because the Elector Defendants' transmissions of falsely certified electoral votes to Congress were protected statements made in a judicial or "at the very least quasi-judicial" proceeding. Dkt. 191 at 9. This argument fails for several reasons. First, as just explained, Plaintiffs have not brought a defamation action against any Defendant. Second, the Elector Defendants' actionable violations include not just their transmission of a fake certificate of votes to Congress, but also their initial execution of that certificate, and their transmission of the certificate to other public officials. Third, the Joint Session of Congress is not a judicial or quasi-judicial proceeding; if anything, it is a legislative proceeding. And the Supreme Court has held that the absolute privilege afforded statements made in judicial proceedings does not extend to statements made in legislative proceedings—at least where those statements are subject to "little guidance, structure or control."

Vultaggio v. Yasko, 215 Wis. 2d 326, 338, 572 N.W.2d 450 (1998). Instead, "testimony at a legislative proceeding of this sort is deserving of a conditional privilege," which "may be forfeited if," among other things, "the witness knows the defamatory matter to be false, or acts in reckless disregard as to its truth or falsity." *Id.* at 344–45. Even if the Elector Defendants' purported votes had "a proper relationship to the issues" addressed at the Joint Session of Congress, *Hartman*, 71 Wis. 2d at 399—something Plaintiffs do not concede—Defendants, including Defendant Troupis, knew that the statements contained within the certificate were false, thereby forfeiting any privilege.

B. The Elector Defendants are not entitled to an advice-of-counsel defense.

Relatedly, the Elector Defendants assert that they are entitled to an advice-of-counsel defense because "[e]ach of the claims raised by the Plaintiffs are based on underlying conclusions that the GOP Electors intentionally violated the law." Dkt. 186 at 34. This argument is mistaken in several respects. First, as the Elector Defendants seem to acknowledge, *see id.* at 34–35, an advice-of-counsel defense is not available where the Defendant's "specific state of mind was not relevant to any of the elements of the crimes with which he had been charged." *State v. Ross*, 2003 WI App 27, ¶27, 260 Wis. 2d 291, 659 N.W.2d 122. Here, Defendants have not shown that all of Plaintiffs' claims against them require proof of their mental states. *See, e.g.*, *Physicians Plus*, 2002 WI 80, ¶21 ("A public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community." (footnote omitted)); Wis. Stat. § 784.04(1) (action for *quo warranto* appropriate where "any person shall usurp, intrude into or unlawfully hold or exercise any public office").

More fundamentally, the Elector Defendants have failed to show, at the pleading stage, that they are entitled to an advice-of-counsel defense. They acknowledge that an advice-of-

counsel defense has five elements. *See Ross*, 2003 WI App 27, ¶24 (a defendant can claim advice of counsel if "(1) before taking action, (2) he in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, and (5) then acted strictly in accordance with the advice of his attorney who had been given a full report" (internal quotation marks and citation omitted)). And they contend that "Plaintiffs have pled the precise elements" on their behalf, Dkt. 186 at 35, simply because Plaintiffs have chosen to reference various memoranda written by Defendant Chesebro and the deposition that Defendant Hitt gave to the Select Committee to Investigate the January 6th Attack on the United States Capitol. But Plaintiffs' reference to these materials does not constitute a wholesale endorsement of the truth of their contents, and even if it did, the referenced materials fall woefully short of establishing each element of an advice-of-counsel defense for each of the Elector Defendants. Aside from Defendant Hitt, the other Elector Defendants have said nothing about their efforts to seek advice from attorneys regarding the legality of their actions. And even Defendant Hitt has not shown, at this early stage, that he is entitled to an advice-of-counsel defense. The Elector Defendants seem to concede, for example, that they were "act[ing] strictly in accordance with" Defendant Chesebro's memoranda. *Id.* at 35–36. But Defendant Hitt testified in his deposition that he "didn't even know who Mr. Chesebro was until December 14th," Dkt. 187 at 35, thereby undermining any argument that he sought advice from Defendant Chesebro regarding the lawfulness of his future conduct, that he thought Defendant Chesebro was a competent attorney, or that he reported to Defendant Chesebro all material facts of which he was aware. The Court should not grant a motion to dismiss based on an affirmative defense unless it is "apparent from the face of the complaint."

Energy Complexes, Inc. v. Eau Claire Cnty., 152 Wis. 2d 453, 463 n.7, 449 N.W.2d 35 (1989). And the Elector Defendants are far from meeting that high bar.

C. The case does not present a political question.

Finally, the Elector Defendants argue that this case presents a non-justiciable political question because "[t]he FAC essentially seeks to relitigate in a Wisconsin Circuit Court the entirety of the [January 6th Committee], an endeavor that took 18 months and involved more than 1,000 witnesses." Dkt. 186 at 39. But just because Defendants violated the law in the context of a political election does not turn their violations into "issues that are essentially political in nature, exclusively committed by the constitution to another branch of government and not susceptible to judicial management or resolution." *Id.* (internal quotation marks and citations omitted). If it did, the entire field of election law would be non-justiciable. While it is true that Defendants' actions were necessary predicates to a broader scheme to overturn the results of the 2020 presidential election, *see, e.g.*, FAC ¶193, Plaintiffs seek to hold them liable for a discrete set of common law and statutory violations related to the false assumption of the office of presidential electors. Whether Defendants entered into a conspiracy, falsely assumed a public office, and knowingly executed and transmitted falsified documents are questions this Court is more than competent to decide.

CONCLUSION

For the reasons above, Plaintiffs respectfully request that this Court deny Defendants' motions to dismiss.

Dated: June 21, 2023.

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